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No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL., *Petitioners*,

v.

JOSHUA DAVEY, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, ARIZONA SCHOOL BOARDS ASSOCIATION, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MINNESOTA SCHOOL BOARDS ASSOCIATION, NEW YORK STATE SCHOOL BOARDS ASSOCIATION, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, UTAH SCHOOL BOARDS ASSOCIATION, VIRGINIA SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE, AND PUBLIC EDUCATION NETWORK, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Washington is required by the Free Exercise Clause to fund religious vocational training as part of a general scholarship program.

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INTEREST OF AMICI[1]

The National School Boards Association ("NSBA"), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, including the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. Many of these states have constitutional provisions similar to the one at issue in this case. NSBA also represents the nation's 95,000 school board members, who govern the 14,722 local school districts that educate 47,000,000 public school students. NSBA is dedicated to the improvement of public education in America and has a long-standing interest in ensuring that state and local governments have maximum flexibility in education funding and other education policy decisions consistent with constitutional requirements.

The Arizona School Boards Association ("ASBA") is a not-for-profit organization representing the governing boards of 225 of Arizona's 230 school districts. The mission of ASBA is "to support the improvement of student achievement by providing leadership and assistance to local school district governing boards serving children and communities, and to promote lay control of public education." Arizona's Constitution, like Washington's, prohibits the use of public funds for religious instruction. Ariz. Const. art. II, § 12 ("No public money or property shall be appropriated for or applied to any religious

[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

worship, exercise, or instruction, or to the support of any religious establishment.").

The Michigan Association of School Boards ("MASB") is a voluntary, not-for-profit association of local and intermediate boards of education throughout Michigan, whose membership consists of the boards of education of over 600 local school boards and intermediate school boards in this state. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education. MASB supports the use of public tax revenues for the financing of public education and opposes any interpretation of law that weakens Michigan's constitutional provision that strictly prohibits the use of public funds to subsidize or support elementary or secondary private parochial schools through vouchers or other direct or indirect payments. Mich. Const. art. VIII, § 2.

The Minnesota School Boards Association ("MSBA") is a not-for-profit organization representing local boards of education. Although membership is voluntary, all 344 local school boards in Minnesota belong to MSBA. The mission of MSBA is to support, promote, and enhance the work of Minnesota's public school boards. Minnesota's Constitution has a provision substantially similar to the one involved in this case. Minn. Const. art. XIII, § 2 ("In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.").

The New York State School Boards Association ("NYSSBA") is a not-for-profit membership organization incorporated under the laws of the State of New York. NYSSBA has a statutory responsibility to devise "practi-

cal ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects" on behalf of New York public school districts. N.Y. Educ. Law § 1618 (McKinney 2000). NYSSBA, which represents approximately 695 of the 742 public school districts in New York State, has a long-standing interest in educational policy affecting the administration and operation of public schools and has appeared in the Court as an amicus on a number of occasions.[2] NYSSBA also was one of the original plaintiffs in *Board of Education* v. *Grumet*, 512 U.S. 687 (1994), and represented the petitioners in *Board of Education* v. *Russman*, 521 U.S. 114 (1997). New York's Constitution has a provision substantially similar to the one involved in this case. See N.Y. Const. art. XI, § 3.

The Pennsylvania School Boards Association ("PSBA") is a voluntary, not-for-profit association comprising virtually all of the 501 local school districts and 29 intermediate units of the Commonwealth of Pennsylvania and the members of the school boards of those school districts and intermediate units, as well as community colleges. PSBA was organized in 1895 and was the first school boards association in the nation. In addition to its comprehensive program of member assistance services, PSBA has a long record of legislative and judicial advocacy related to all issues affecting public schools in Pennsylvania. PSBA has a substantial interest in this litigation because Pennsylvania has constitutional provisions prohibiting the use of public school funds for the support of sectarian schools and limiting the use of pub-

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[2] *E.g.*, *Good News Club* v. *Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Lamb's Chapel* v. *Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993).

lic funds for certain other sectarian purposes. See Pa. Const. art. III, § 15. This case has the potential to substantially weaken Pennsylvania's state constitutional provisions.

The Utah School Boards Association ("USBA") is recognized by Utah statute as an organization and representative of the school boards of Utah. It is a voluntary association representing all forty of the local school districts in the state, as well as the Utah State Board of Education. The Utah Constitution provides: "There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment." Utah Const. art. I, § 4.

The Virginia School Boards Association ("VSBA") is a private, voluntary, nonpartisan organization representing local school boards in Virginia. Membership in the VSBA is voluntary, but every local school board in Virginia is a member. The VSBA's primary mission is the advancement of education through the unique American tradition of local citizen control of, and accountability for, the Commonwealth's public schools. The VSBA joins in this amicus brief because the case has national significance and has the potential substantially to weaken state constitutional provisions that prohibit the use of public funds to support religion. Virginia's constitution contains such a provision, see Va. Const. art. VIII, § 11, and the decision in this case may directly affect the viability of that provision.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional organization for over 14,000 educational leaders across America and in many other countries. AASA's mission is to sup-

port and develop effective school system leaders who are dedicated to the highest quality public education for all children.

The Horace Mann League was founded in 1922 to perpetuate the ideals of Horace Mann, the founder of the American public school system. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a necessary unifying and dynamic influence in American life.

The Public Education Network has 80 Local Education Fund members in 31 states and the District of Columbia working on behalf of over 10.6 million children in more than 16,500 schools and 1,220 districts. Its mission is to build public demand and mobilize resources for quality public education for all children through a national constituency of local education funds and individuals.

SUMMARY

In this case Washington State has established a program that makes postsecondary scholarships generally available based on high school performance and financial need but excludes their use for religious instruction. The Washington Constitution compelled this exclusion because, unlike the Establishment Clause, it "prohibits not only the *appropriation* of public money for religious instruction, but also the *application* of public funds to religious instruction." *Witters* v. *Comm'n for the Blind*, 771 P.2d 1119, 1122 (Wash. 1989). The decision not to fund religious instruction even indirectly is one that state and local governments should be allowed to make in the exercise of their spending discretion—whether as a matter of legislative choice or, as here, to implement a state constitutional command. States rightly enjoy wide latitude in determining how to allocate their scarce resources, and the Court has recognized the special importance of state and local flexibility in education spending.

The Washington constitutional provision prohibiting the application of public funds to religious uses is valid as applied in this case. States are generally free to provide more expansive protections than the federal constitution affords and, within the limits of the federal constitution, a state may guarantee stricter separation of church and state than the Establishment Clause requires. The Free Exercise Clause, moreover, does not require a state to fund religious instruction if it elects to fund secular instruction. The government generally is not required to fund the exercise of a constitutional right, even when it funds competing activities; and the denial of funding for religious instruction does not substantially burden the free exercise of religion. Washington's program also is not designed to facilitate private speech, and it does not create a public forum for expressive conduct requiring "equal access." The state's decision to limit the use of scarce public funds to secular educational uses is constitutionally permissible.

ARGUMENT

I. STATES MAY GUARANTEE STRICTER SEPARATION OF CHURCH AND STATE THAN THE FEDERAL CONSTITUTION REQUIRES.

Washington, like at least twenty-six other states,[3] has chosen to protect the religious freedom of its citizens by

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[3] Ariz. Const. art. II, § 12; Cal. Const. art. XVI, § 5; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, ¶ VII; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ky. Const. § 189; Mass. Const. art. XLVI, Amendments, art. XVIII, § 2; Mich. Const. art. XIII, § 2; Minn. Const. art. XIII, § 2; Mo. Const. art. IX, § 8; Mont. Const. art. X, § 6; Nev. Const. art. XI,

(continued)

guaranteeing stricter separation of church and state than the Establishment Clause requires. Wash. Const. art. I, § 11.[4] Unlike the Establishment Clause, the Washington Constitution "prohibits not only the *appropriation* of public money for religious instruction, but also the *application* of public funds to religious instruction. Herein lies a major difference between [Washington's] state constitution and the establishment clause of the first amendment to the United States Constitution." *Witters*, 771 P.2d at 1122. Absent a conflict with federal constitutional guarantees, see *Widmar* v. *Vincent*, 454 U.S. 263, 277-78 (1981), Washington may provide stricter separation of church and state than the federal constitution requires.[5]

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§ 10; N.M. Const. art. XII, § 3; N.Y. Const. art. XI, § 3; N.D. Const. art. VIII, § 5; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; Pa. Const. art. III, § 15; S.D. Const. art. VI, § 3, art. VIII, § 16; Tex. Const. art. I, § 7; Utah Const. art. I, § 4; Vt. Const. ch. 1, art. III; Va. Const. art. VIII, § 11; Wyo. Const. art. I, § 19.

[4] Art. I, § 11 of Washington's Constitution states:

> RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

[5] Consistent with its decision to provide greater protection for religious freedoms than are contained in the federal Establishment and Free Exercise Clauses, the Washington Supreme Court has also extended greater protection under its version of

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It is axiomatic that state constitutions may offer more expansive protections than the federal constitution affords, as long as those expanded protections do not trench on federal constitutional rights. "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum." *Mills* v. *Rogers*, 457 U.S. 291, 300 (1982). "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protections to individual rights than do similar provisions of the United States Constitution." *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995). Thus, for example, the Court has held that states may provide greater First Amendment protections than the federal constitution requires, where those protections did not result in violations of other constitutional guarantees. *Pruneyard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980). In reviewing state action challenged as unconstitutional, moreover, the Court has shown particular solicitude for state constitutional guarantees. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 471 (1991) ("In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it.").

Although the Establishment Clause permits a state to provide individuals with funds that they may use to pay

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the Free Exercise Clause than the federal Constitution requires. See *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992) (rejecting Free Exercise standard set in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990), in favor of more religion-protective rule).

for religious instruction, the Free Exercise Clause does not *require* a state to do so as a condition of providing funding for secular instruction. The Free Exercise Clause does not generally preclude states from implementing stricter separation of church and state than the Establishment Clause requires. The requirements of each Clause are not merely the flip side of the requirements of the other, such that any attempt to afford stronger protections than are required by one automatically results in a violation of the other. Thus, the Court has stated that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). And in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), eight members of the Court disclaimed interpreting the requirements of the Free Exercise Clause as simply the obverse of the prohibitions of the Establishment Clause.

In holding that the Establishment Clause prohibited a state from exempting, from an otherwise applicable tax, religious organizations whose publications were of a religious nature, the *Texas Monthly* plurality disclaimed suggesting that government benefits "are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause," *id.* at 18 n.8 (Brennan, J., joined by Marshall & Stevens, JJ.), while the concurrence separately affirmed the importance of not interpreting the Clauses in a manner "that negates the legislative role altogether," *id.* at 28 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). The dissent similarly argued against any interpretation of the Clauses that "would completely block off the already narrow 'channel between the Scylla [of what the Free Exercise Clause demands] and the Charybdis [of what the Establishment Clause forbids].'" *Id.* at 42 (Scalia, J., joined by Rehnquist, C.J. & Kennedy, J., dissenting)

(quoting *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting)).

Indeed, in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court appeared to recognize implicitly that a state might do what Washington has done here. Although the Court in that case held that the Establishment Clause did not prohibit Washington from granting vocational assistance to one pursuing a religious calling, the Court remanded the case for consideration of the applicability of "the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489 (quoting *Witters* v. *Comm'n for the Blind*, 689 P.2d 53, 55 (Wash. 1984)). Cf. *Smith*, 494 U.S. at 890 (stating that states may accommodate the religious use of peyote in their drug laws even though the Free Exercise Clause does not require them to do so).

The Court's recognition of state authority to confer protections beyond those mandated by the federal constitution is consistent with respect for the "federalism prerogatives of the states," *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring), and with the need, exemplified by this case, to avoid "handcuff[ing] the State's ability to experiment with education," *id.* at 680. "[S]uch federalism concerns," as Judge McKeown wrote, "should [not] represent a one-way street when it comes time for a state to decide whether to enter the ill-defined terrain of the Establishment Clause jurisprudence." App. 49a-50a (dissenting opinion). States thus should be able to provide greater protection for religious freedom than the Constitution requires by prohibiting indirect funding that the Establishment Clause allows. If states were permitted to treat the funding of sectarian and non-sectarian pursuits differently only when the Establishment Clause required

them to do so, "[t]he upshot would be to deny the states any room whatsoever for their own church-state policy . . . . It is hard to imagine a doctrine more hostile to notions of respect for state law, and in particular to the tradition of independent state constitutional law." Ira C. Lupa & Robert W. Tuttle, *Zelman's Future: Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 965-66 (2003).

II. DENYING PUBLIC FUNDING FOR RELIGIOUS INSTRUCTION DOES NOT OFFEND THE FREE EXERCISE CLAUSE.

The Free Exercise Clause prohibits government interference with an individual's free exercise of religion. It is a limitation on governmental intrusion, not a requirement of affirmative government support. The court below accordingly recognized that the Free Exercise Clause does not generally require the government to subsidize respondent's pursuit of religious instruction. App. 17a-18a. It held, however, that Washington's scholarship program violates the Free Exercise Clause because it denies respondent a benefit available to others based on the religious nature of his pursuit. App. 8a. Under this Court's cases, however, Washington is not required to fund religious educational pursuits if it funds secular educational pursuits.

A. States Have Broad Latitude in Public Funding Choices.

Government has wide discretion in distributing public funds to subsidize programs for the general welfare. "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991). "So long as legislation does not infringe on constitutionally protected rights, [government] has wide

latitude to set spending priorities." *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 588 (1998). As long as the government does not "discriminate invidiously in its subsidies in such a way as to "aim[ ] at the suppression of dangerous ideas," *Regan* v. *Taxation with Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959)), its "selection of particular entities or persons for entitlement to this sort of largess" is "a matter of policy and discretion," *id.* at 549 (quoting *United States* v. *Realty Co.*, 163 U.S. 427, 444 (1896)). In providing that public funds may be used for secular but not religious instruction, Washington has not "aimed at the suppression of dangerous ideas," *Cammarano*, 358 U.S. at 513; the state has "merely chosen to fund one activity to the exclusion of another." *Rust*, 500 U.S. at 193; see *Finley*, 524 U.S. at 588 (in funding activities that it favors without funding competing activities, "'the Government has not discriminated on the basis of viewpoint'") (quoting *Rust*, 500 U.S. at 193).[6]

Latitude in spending decisions is a critical component of the states' role, within constitutional limitations, as "laboratories" in our federal system: "It is one of the happy accidents of the federal system that a . . . state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). When there is disagreement about how best to achieve a

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[6] "It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the *suppression* of dangerous ideas.'" see also *Finley*, 524 U.S. at 596 (Scalia, J., joined by Thomas, J., concurring in the judgment) (quoting *Taxation with Representation*, 461 U.S. at 550)).

societal goal, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States* v. *Lopez*, 514 U.S. 549, 581 (1995); see also *Printz* v. *United States*, 521 U.S. 898, 918-22 (1997).

The Court has recognized the particular need for latitude in the context of educational funding, noting that the judiciary "lack[s] both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 41 (1973); see also *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Thus, the Court has admonished that "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Rodriguez*, 411 U.S. at 42-43; see also *Simmons-Harris*, 536 U.S. at 679 (Thomas, J., concurring).

B. States Are Not Required To Fund the Exercise of Constitutional Rights.

Respondent has no personal entitlement to funds from the state to support his religious vocational training. The Court has consistently rejected "the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Taxation with Representation*, 461 U.S. at 546 (quoting *Cammarano*, 358 U.S. at 515 (Douglas, J., concurring)). Thus, the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion," *Lyng* v. *N.W. Indian Cemetary Protective Ass'n*, 485 U.S. 439, 448 (1988), but it does not give an individual a right to

public funding of his or her religious pursuits: "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *United States* v. *Am. Library Ass'n, Inc.*, 123 S. Ct. 2297, 2308 (2003) (plurality opinion) (quoting *Rust*, 500 U.S. at 193 (alteration in original)). Like the Due Process Clause, the Free Exercise Clause "affords protection against unwarranted government interference with freedom" but "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Harris* v. *McRae*, 448 U.S. 297, 317-18 (1980).

C. Denial of Funding for Religious Instruction Does Not Substantially Burden Free Exercise.

Contrary to the Ninth Circuit, Washington's decision to exclude religious vocational training from its subsidy program is not "a law restrictive of religious practice." App. 13a (quoting *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993)). "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Am. Library Ass'n*, 123 S. Ct. at 2308 (quoting *Rust*, 500 U.S. at 193); see also *Finley*, 524 U.S. at 587-88 ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."); *id.* at 595-99 (Scalia, J., joined by Thomas, J., concurring in the judgment). Nor is Washington denying a benefit to individuals because they have exercised a constitutional right, as the Ninth Circuit supposed, see App. 18a; the state has simply declined to fund the exercise of that right, see *Maher* v. *Roe*, 432 U.S. 464, 474 (1977).

The Ninth Circuit relied on two Free Exercise cases involving direct governmental prohibitions—*Lukumi* and

McDaniel v. *Paty*, 435 U.S. 618 (1978)—which, in turn, rely upon the principles of *Sherbert* v. *Verner*, 374 U.S. 398 (1963). App. 13a-18a. These cases are inapposite.

Unlike this case, *Sherbert* involved a "substantial" burden on Free Exercise rights, see *Smith*, 494 U.S. at 883-84, compounded by discrimination among religions, see *Sherbert*, 374 U.S. at 406. In *Sherbert*, there was a real concern that the state's law precluded the individual not only from receiving unemployment compensation but also from ever obtaining another job so long as she continued to exercise her religious beliefs. See 374 U.S. at 404. By contrast, as Judge McKeown observed, "Davey has sustained no substantial burden; he continues to pursue his double major in Pastoral Studies and Business Management." App. 39a (dissenting opinion). Unlike the plaintiff in *Sherbert*, who was left unemployed, uncompensated, and ultimately unemployable, the only way in which respondent "suffers" is that the state will not pay for his continuing religious vocational training. The Court has previously distinguished the government's refusal to subsidize particular protected activity from *Sherbert*'s "broad disqualification from receipt of public benefits." *Harris*, 448 U.S. at 317 n.19.

In *McDaniel*, the plaintiff was forced to choose between the free exercise of his religious beliefs and the exercise of his constitutional right to hold public office. See 435 U.S. at 626 ("[T]he State has conditioned the exercise of one on the surrender of the other."). Respondent has not been forced to choose between two competing constitutional rights. Washington's program leaves respondent free to pursue religious instruction. That he must do so using private resources does not render the state's program unconstitutional. *Maher*, 432 U.S. at 474-76; see also *Am. Library Ass'n*, 123 S. Ct. at 2308 n.6 ("The invalidated state action in [political patronage cases] involved true penalties, such as denial of a promotion or outright discharge from employment, not nonsubsidies."); *Harris*, 448 U.S. at 314-16 (state spending choice that may encourage an individual to forego the exercise of a protected right does not impermissibly restrict the exercise of that right).

The Promise Scholars program does not disqualify individuals like Davey from seeking religious vocational training; it simply will not fund religious training. Nothing in the program prohibits those with religious vocational aspirations from using a Promise Scholarship to obtain a different degree. Nothing in the program prohibits those who have received Promise Scholarships from seeking a religious vocational degree at a separate institution, thereby both receiving Promise Scholarship funding and pursuing a religious vocational degree with private funding. Nothing in the program prohibits attendance at religious schools or enrollment in religious classes. The only limitation on conduct from the grant of public funds is that Washington will not itself pay for the conferral of a religious vocational degree.

Finally, *Lukumi* is inapposite. As the Ninth Circuit itself recognized, the Promise Scholars program "neither prohibits religious conduct nor does its application turn on the student's religious motivation. In this respect we agree . . . that the Washington statute differs from the *Lukumi* ordinances." App. 14a. The law in *Lukumi* was a direct criminal prohibition against the particular animal sacrifice practices of a specific religious minority. See 508 U.S. at 525-27. The Court noted the existence of discriminatory animus by the Hialeah City Council and found that "suppression of the central element of the Santeria worship service was the object of the ordinances." See *id.* at 534. Washington's Promise Scholars program is a public subsidy, not a criminal penalty. It

does not target any specific religious practice or religious group. And it places no barrier to individuals attaining a degree in religious vocational studies.

D. The Promise Scholars Program Is Not a Public Forum Requiring Equal Access.

In concluding that Washington's program was unconstitutional the Ninth Circuit relied heavily on *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and other public forum cases, App. 18a-21a, but the court's reliance on such cases was misplaced. The court believed that *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001), supported reliance on those cases in the subsidy context, App. 20a-21a, but the Court in *Valazquez* treated *Rosenberger* as pertinent only because, like the program in *Rosenberger*—but unlike the Scholars Program—the LSC program at issue in that case "was designed to facilitate private speech." 531 U.S. at 542. In creating the Scholars Program, Washington has not undertaken to facilitate private speech or create a public forum.

To create a non-traditional public forum, "the government must make an affirmative choice to open up its property for use *as* a public forum." *Am. Library Ass'n*, 123 S.Ct. at 2305 (emphasis added). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Id.* (quoting *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)); accord *Int'l Soc'y of Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). In creating the Promise Scholars program, Washington did not purposely establish a "forum for public discourse." It created the program to help qualified applicants obtain college degrees.

Like the Internet access provided in *American Library Ass'n*, the Washington program provides scholarships "not to 'encourage a diversity of views from private speakers' but . . . to facilitate research [and] learning." 123 S. Ct. at 2305 (quoting *Rosenberger*, 515 U.S. at 834 (1995)). And just as the fact that it is a center of First Amendment activity does not render a library's provision of Internet access a public forum, so the fact that "expressive conduct, creative inquiry, and the free exchange of ideas are what the educational enterprise is all about," App. 20a, does not render Washington's scholarship program a public forum.

In *Rosenberger*, 515 U.S. 819, by contrast, the university was found to have established a limited public forum. The purpose of the student activity funds in that case was to "open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." *Id.* at 840. In fact, all of the Court's public forum cases involve access to school facilities that the government has opened for speech. See *Good News Club*, 533 U.S. at 108 (school facilities opened to private expressive activity); *Lamb's Chapel*, 508 U.S. at 393 (school property opened "for the presentation of all views about family issues"); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 41 (1983) (local associations seeking access to inter-school mail system for communication); *Widmar*, 454 U.S. at 271 n.10 (university's "avowed purpose" was "to provide a forum in which students can exchange ideas"). *Valazquez* and *Rosenberger* are therefore inapposite.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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